

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

UNITED STATES OF AMERICA

v.

MARK FORKNER (01)

Case No. 4:21-CR-00268-O

**MR. FORKNER’S REPLY TO GOVERNMENT’S RESPONSE TO MOTION TO
COMPEL DISCOVERY**

The government says:

there is no Brady/Giglio and

if there is any Brady/Giglio, the defense can find it itself in the 67.2 million pages
with the help of the government’s “detailed index.”

The first argument creates a dilemma for the district court. The second does not. Either way, the answer is to allow the defense the time it needs to find the favorable evidence in the discovery haystack. We address these in reverse order.

1. The “Detailed Index” Does Not Identify Brady or Giglio

The government was correct to produce all that it produced. But if the government is aware of Brady or Giglio material, it should identify that material to the defense. As our cases note, to say that the Brady/Giglio is “somewhere” in 67.2 million pages is not sufficient.

The government has repeatedly told the Court that it produced a “detailed index.” Firstly, there is no index of the 316,543 pages of “hot docs:” we are reviewing those documents one-by-one.

The larger database does have an index. *See* ECF No. 25-1. Here is a page from it. Some entries are specific. Others are not. Line 145 represents 39,235,053 pages from the FAA. More importantly this index is not a substitute for electronic searches. As described in the Third Motion for Continuance, searching the database has glitches that we are fixing as we encounter them.

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10/20/2021

Government Production 1 Index

Item Number	Producing Party	Description	Production BEGDOC	Production ENDDOC	Production BEGDOC of Associated Cover Letter	Original BEGDOC	Original ENDDOC
139	Peter Lemme	Documents produced by Peter Lemme	DOJ-PROD-0009134262	DOJ-PROD-0009144423	DOJ-PROD-0054288850	N/A	N/A
140	Thomas Imrich	Documents produced by Thomas Imrich	DOJ-PROD-0009144424	DOJ-PROD-0009144477	DOJ-PROD-0054288857	N/A	N/A
141	Cynthia Cole	Documents produced by Cynthia Cole	DOJ-PROD-0009144478	DOJ-PROD-0009144513	DOJ-PROD-0054288814	N/A	N/A
142	Rick Ludtke	Documents produced by Rick Ludtke	DOJ-PROD-0009144514	DOJ-PROD-0009144516	N/A	N/A	N/A
143	Edward Pierson	Documents produced by Edward Pierson	DOJ-PROD-0009144517	DOJ-PROD-0009144589	DOJ-PROD-0054288815	N/A	N/A
144	Edward Pierson	Documents produced by Edward Pierson	DOJ-PROD-0009144590	DOJ-PROD-0009144594	DOJ-PROD-0054288825	N/A	N/A
145	Federal Aviation Administration	Documents responsive to DOT-OIG requests to FAA for documents associated with custodians Dale Bosselmann, Mikal Campanello, Stacey Klein, Aaron Perkins, and William Schubbe through 2/14/2019; emails, contacts, and calendars from FAA accounts from 1/1/2015 - 4/2/2019 including search terms @boeing.com, variants on the keyword 737 MAX, and variants of the words MCAS, Lion Air, Ethiopia, Certification, AOA, training, money, cost, price, declined, sensor, Forkner, disagree, and forced; documents from the time period 1/1/2015 - 4/16/2019 associated with custodians Ali Bahrami, Brian Morris, Christy Helgeson, David Hempe, David Howard, Earl Lawrence, Gaetano Sciortino, Ian Won, James Cashdollar, James Kline, Jeff Duven, Jeffrey Rees, Johanna Forkner, John Duncan, John Hickey, John Piccola, Kenneth Fairhurst, Kevin Greene, Lance Gant, Marlan Perhus, Michael Kaszycki, Paul Bernado, Robert Carty, Ross Landes, and Shaun Ripple; documents associated with custodian Eugene Arnold from 1/1/2015 through 6/7/2019; and 737 MAX search terms from calendar years 2015-2019	DOJ-PROD-0009144595	DOJ-PROD-0048379648	N/A	N/A	N/A
146	American Airlines	Invoice documentation related to American Airlines' purchase of the 737 MAX	DOJ-PROD-0048379649	DOJ-PROD-0048379666	DOJ-PROD-0054289008	AA-MAX-00113350	AA-MAX-00113367
147	Federal Aviation Administration	Documents produced by the FAA, including post-Lion Air crash documents	DOJ-PROD-0048379667	DOJ-PROD-0048383859	N/A	N/A	N/A
148	Department of Transportation Office of Inspector General	Emergency Airworthiness Directive (dated 11/7/2018, publicly available online)	DOJ-PROD-0048383860	DOJ-PROD-0048383864	N/A	N/A	N/A
149	Federal Aviation Administration	Documents produced by the FAA, including post-Lion Air crash documents	DOJ-PROD-0048383865	DOJ-PROD-0048383888	N/A	N/A	N/A
150	Department of Transportation Office of Inspector General	Printout from NASA ASRS Reports for 737 MAX webpage (publicly available online)	DOJ-PROD-0048383889	DOJ-PROD-0048383890	N/A	N/A	N/A
151	Federal Aviation Administration	Letter from Stacey Klein to Patrik Gustavsson dated 12/13/2018	DOJ-PROD-0048383891	DOJ-PROD-0048383891	N/A	N/A	N/A

To speed our review, we moved to compel discovery on legitimate topics that we identified as favorable such as:

Evidence that Mr. Forkner did not see MCAS in the simulator;

Evidence that Ms. Klein accessed the “SharePoint” system that described MCAS expansion.

What documents did a key government witness review before coming up with his testimony.

The government says these are “Sideshows.” They are not. The government says we are seeking “what every person at Boeing disclosed to every person at the FAA about the 737MAX.” We are not. We are seeking favorable and relevant evidence.

The Court already has ordered the government under new Rule 5f to produce Brady material if it is aware of any. “*Find it if you can*” in 67.2 million pages—and do so in 76 days, with everything else that is going on¹—does not satisfy the obligations of Brady.

2. “There is No Brady”

The government’s primary argument, however, is that “there is no Brady” in the 67.2 million documents, and the defense need only concern itself with the prosecution’s 75

¹ That is the number of days between the defense gaining access to the database and trial – but there were many difficulties that delayed reviewing the data. See Third Motion for Continuance filed today. And preparing for trial involves much more than just laying eyes on documents. We also have been consumed with pleadings; chasing the FAA to allow access to witnesses; finding other witnesses; legal research; conducting our own investigation; reading the “hot docs;” – and the other tasks needed to prepare for trial. The government relies on the Skilling standard while glossing over that Skilling had two years before his trial.

exhibits and 9 witnesses. Faced with such an argument, we do not expect the Court to review 67.2 million pages—but *we* need time to do that *ourselves*. First, no defendant would limit his review of discovery to what the government says is relevant. Having obtained, reviewed, and produced 67.2 million pages—and Rule 16E requires the government to produce information that is “material to the defense”—the government cannot say we should ignore it.

Second, however, we have tried to show the Court—most recently in our Third Motion for Continuance—that we are finding favorable, relevant materials in our review of discovery. For example, it is relevant and favorable to the defense that Mr. Forkner did not see MCAS in the simulator in November 2016; we see references to “data” that proves that; if Boeing’s latest voluntary production of December 17 does not contain it, we will move to subpoena it for pretrial production.

As another example, it is relevant and favorable that FAA Officials who worked on MAX say that the indictment is a miscarriage of justice, a scapegoating, that the real problem with MCAS was an engineering issue that Mr. Forkner was neither qualified, expected, nor responsible for. The government had free access to these Officials for years. When we learned of them, the FAA blocked access to them until we filed a Motion for Access. We will return to the Court if the FAA does not follow through and make them available in early January.

3. Conclusion

The parties have different views of Brady and Giglio. The defense has a duty to review discovery and follow leads to exculpatory and impeachment evidence. See Third Motion for Continuance (we are almost half-way through the “hot docs,” reading 20,000 pages a week, and are finding such evidence). Saying “there is no Brady – just look at our 75 exhibits” does not define the role of the defense in this complex case, which spans two-and-one-half years of communication with the FAA. Having produced discovery that is “material,” the government should not seek to deny us the time to review what it provided.

Respectfully submitted,

/s/ Jeff Kearney

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CERTIFICATE OF SERVICE

I hereby certify this Motion was electronically filed, and Assistant United States Cory Jacobs was electronically served via this Court's Electronic Filing System on this 22nd day of December 2021.

/s/ _____
JEFF KEARNEY